

NOTICE

*This is a summary disposition issued under Alaska Appellate Rule 214(a). Summary dispositions of this Court do not create legal precedent and are not available in a publicly accessible electronic database. See Alaska Appellate Rule 214(d).*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

BOBBY GREG NASHOOKPUK,  
  
Appellant,  
  
v.  
  
STATE OF ALASKA,  
  
Appellee.

Court of Appeals No. A-12780  
Trial Court No. 4FA-14-03217 CR

SUMMARY DISPOSITION

No. 0099 — January 2, 2020

Appeal from the Superior Court, Fourth Judicial District,  
Fairbanks, Paul R. Lyle, Judge.

Appearances: Megan R. Webb, Assistant Public Defender, and  
Quinlan Steiner, Public Defender, Anchorage, for the Appellant.  
Diane L. Wendlandt, Assistant Attorney General, Office of  
Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney  
General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison,  
Judges.

Bobby Greg Nashookpuk was convicted, following a jury trial, of first-degree sexual assault.<sup>1</sup> He appeals, arguing that the superior court committed plain error when it failed to provide the jury with a factual unanimity instruction.

At trial, C.J. testified that Nashookpuk engaged in penile-vaginal penetration with her without her consent. On direct examination, she testified that the

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<sup>1</sup> AS 11.41.410(a)(1).

penetration occurred after she used the bathroom. On cross-examination, however, C.J. testified that Nashookpuk engaged in penile-vaginal penetration with her without her consent both before and after she used the bathroom.

Nashookpuk testified in his own defense, testifying that he and C.J. engaged in consensual sex. His testimony suggested that he and C.J. were engaged in one continuous act of consensual sex, and he did not mention C.J. using the bathroom.

In the opening statements and closing arguments, both attorneys cast the central question of the case as one of credibility. Neither attorney suggested that the evidence should be viewed as involving two acts of sexual assault. Nashookpuk did not request a factual unanimity instruction, and no instruction was given.

On appeal, Nashookpuk argues that it was plain error for the trial court to fail to provide a factual unanimity instruction because the jury may not have been unanimous as to which sexual act formed the basis for the conviction.

Plain error is an error that (1) was not the result of intelligent waiver or tactical decision not to object, (2) was obvious, (3) affected substantial rights, and (4) was prejudicial.<sup>2</sup> Because the failure to give a factual unanimity instruction is constitutional error, we must conclude that there was prejudice unless the error was harmless beyond a reasonable doubt.<sup>3</sup>

Here, the State argues that any error in failing to give a factual unanimity instruction was harmless beyond a reasonable doubt because Nashookpuk offered a blanket defense — that any sexual penetration that did occur was consensual — and the jury rejected this defense.<sup>4</sup>

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<sup>2</sup> *Adams v. State*, 261 P.3d 758, 773 (Alaska 2011).

<sup>3</sup> *Anderson v. State*, 337 P.3d 534, 536-37 (Alaska App. 2014).

<sup>4</sup> *See id.*; *see also Covington v. State*, 711 P.2d 1183, 1184-85 (Alaska App. 1985).

We agree with this analysis. As the State points out, Nashookpuk's defense was that the sexual penetration that occurred was consensual. Notably, none of Nashookpuk's statements — either in his testimony at trial or in his prior statements that were played to the jury — differentiated between any act of sexual penetration or when it occurred relative to C.J. using the bathroom. In addition, both attorneys presented the case as turning primarily on questions of credibility, and both attorneys argued this case as though there was only one continuous act of sexual penetration.

Nashookpuk's case is therefore unlike *Jackson v. State*, a case he cites in support of his position on appeal.<sup>5</sup> In *Jackson*, the victim testified that both penile-vaginal and penile-anal penetration occurred without her consent.<sup>6</sup> The defense theory was that the penile-vaginal penetration was consensual and that the penile-anal penetration was accidental.<sup>7</sup> Because the defenses to the two acts of penetration were different, and because the jury was not provided with a factual unanimity instruction, we concluded that there was a reasonable possibility that the jury was not unanimous as to the specific act of sexual assault for which it was convicting Jackson. We therefore held that the failure to give a factual unanimity instruction was not harmless error.<sup>8</sup>

Here, in contrast to *Jackson*, there were no distinct defenses to the sexual penetration that allegedly occurred before C.J. went to the bathroom and the sexual penetration that allegedly occurred after C.J. went to the bathroom. Indeed, both parties argued the case as though there was only one continuous act of sexual penetration.

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<sup>5</sup> *Jackson v. State*, 342 P.3d 1254 (Alaska App. 2014).

<sup>6</sup> *Id.* at 1256.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1261.

Given the manner in which this case was argued, we find that any error in failing to give the jury a factual unanimity instruction was harmless beyond a reasonable doubt.

The judgment of the superior court is AFFIRMED.